

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, November 17, 2021

Hearing Room 1568

10:00 AM

2:21-11176 Jason Daniel Dale

Chapter 7

#1.00 APPLICANT: TRUSTEE: JASON M RUND

Hearing re [27] and [28] Applications for chapter 7 fees and administrative expenses

Docket 0

Tentative Ruling:

11/16/2021

Note: Unless otherwise notified all parties must appear by telephone. The courtroom is undergoing renovation. All parties are directed to contact CourtCall at 888-882-6878 no later than one hour before the hearing.

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows:

Total Trustee's Fees: \$1,168.75 [*see* Doc. No. 27]

Total Trustee's Expenses: \$108.95 [*see id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

The chapter 7 trustee shall submit a conforming order within seven days of the hearing.

Party Information

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Central District of California
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CONT... Jason Daniel Dale

Chapter 7

Debtor(s):

Jason Daniel Dale

Represented By
Roland H Kedikian

Trustee(s):

Jason M Rund (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
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Wednesday, November 17, 2021

Hearing Room 1568

10:00 AM

2:20-20772 FDZ Homes, Inc.

Chapter 11

#2.00 Hearing
RE: [125] Post confirmation status conference

Docket 125

***** VACATED *** REASON: CONTINUED 2-8-22 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

FDZ Homes, Inc.

Represented By
Andrew S Bisom
Jose Arana

Trustee(s):

Gregory Kent Jones (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
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Wednesday, November 17, 2021

Hearing Room 1568

10:00 AM

2:21-12463 J.H. Bryant Jr., Inc.

Chapter 11

#3.00 HearingRE: [156] Application for Compensation First and Final Fee Application for Compensation and Reimbursement of Expenses by Danning, Gill, Israel & Krasnoff, LLP as General Bankruptcy Counsel to Debtor; Declarations of Zev Shechtman and John H. Bryant, III, in Support Thereof, With Proof of Service for Danning, Gill, Israel, & Krasnoff, LLP, General Counsel, Period: 3/26/2021 to 10/27/2021, Fee: \$337,832.00, Expenses: \$13,135.64. (Shechtman, Zev)

Docket 156

Tentative Ruling:

11/16/2021

Note: Unless otherwise notified all parties must appear by telephone. The courtroom is undergoing renovation. All parties are directed to contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Note: Telephonic Appearances Only. The Courtroom is being renovated and will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878 no later than one hour before the hearing. The cost for persons representing themselves has been waived.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$337,832.00 [Doc. No. 156]

Expenses: \$13,135.64 [*Id.*]

Applicant is authorized to drawdown on the retainer as requested in this application.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please**

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CONT... J.H. Bryant Jr., Inc.

Chapter 11

first contact opposing counsel to inform them of your intention to do so. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

Debtor(s):

J.H. Bryant Jr., Inc.

Represented By

Zev Shechtman

Michael G D'Alba

Aaron E DE Leest

Alphamorlai Lamine Kebeh

Trustee(s):

Susan K Seflin (TR)

Pro Se

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2:21-12463 J.H. Bryant Jr., Inc.

Chapter 11

#4.00 Hearing re [157] Final Applications For Compensation And Reimbursement Of Expenses By Professionals for Raimondo Pettit Group

Docket 0

Tentative Ruling:

11/16/2021

See calendar number 6, incorporated in full by reference.

Party Information

Debtor(s):

J.H. Bryant Jr., Inc.

Represented By

Zev Shechtman

Michael G D'Alba

Aaron E DE Leest

Alphamorlai Lamine Kebeh

Trustee(s):

Susan K Seflin (TR)

Pro Se

**United States Bankruptcy Court
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2:21-12463 J.H. Bryant Jr., Inc.

Chapter 11

#5.00 HearingRE: [161] Application for Compensation First and Final Application for Compensation by Armory Consulting Company as Financial Advisor for the Debtor; Declaration of James Wong in Support Thereof, With Proof of Service for Armory Consulting Company, Financial Advisor, Period: 3/26/2021 to 10/25/2021, Fee: \$77,832.50, Expenses: \$219.97.

Docket 161

Tentative Ruling:

11/16/2021

Note: Unless otherwise notified all parties must appear by telephone. The courtroom is undergoing renovation. All parties are directed to contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$64,107.50 [Doc. No. 161]

Expenses: \$219.97 [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

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CONT... J.H. Bryant Jr., Inc.

Chapter 11

Debtor(s):

J.H. Bryant Jr., Inc.

Represented By

Zev Shechtman

Michael G D'Alba

Aaron E DE Leest

Alphamorlai Lamine Kebeh

Trustee(s):

Susan K Seflin (TR)

Pro Se

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2:21-12463 J.H. Bryant Jr., Inc.

Chapter 11

#6.00 HearingRE: [163] Application for Compensation Application for Payment of Final Fees and/or Expenses (11 U.S.C. § 330), With Proof of Service for RAIMONDO PETTIT GROUP, Accountant, Period: 4/23/2021 to 9/30/2021, Fee: \$4947.50, Expenses: \$.00.

Docket 163

Tentative Ruling:

11/16/2021

Note: Unless otherwise notified all parties must appear by telephone. The courtroom is undergoing renovation. All parties are directed to contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$4,947.50 [Doc. No. 163]

Expenses: \$0.00 [*Id.*]

Allowed Fees: \$1,997.50 (Previously paid \$2,950.00 in ordinary course of business) [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

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CONT... J.H. Bryant Jr., Inc.

Chapter 11

Debtor(s):

J.H. Bryant Jr., Inc.

Represented By

Zev Shechtman

Michael G D'Alba

Aaron E DE Leest

Alphamorlai Lamine Kebeh

Trustee(s):

Susan K Seflin (TR)

Pro Se

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2:21-12463 J.H. Bryant Jr., Inc.

Chapter 11

#7.00 HearingRE: [154] Application for Compensation (with Proof of Service) for Susan K Seflin (TR), Trustee Chapter 9/11, Period: 3/30/2021 to 10/15/2021, Fee: \$16398.50, Expenses: \$27.86. (Seflin (TR), Susan)

Docket 154

Tentative Ruling:

11/16/2021

Note: Unless otherwise notified all parties must appear by telephone. The courtroom is undergoing renovation. All parties are directed to contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$16,398.50 [Doc. No. 154]

Expenses: \$27.86 [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

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CONT... J.H. Bryant Jr., Inc.

Chapter 11

Debtor(s):

J.H. Bryant Jr., Inc.

Represented By

Zev Shechtman

Michael G D'Alba

Aaron E DE Leest

Alphamorlai Lamine Kebeh

Trustee(s):

Susan K Seflin (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
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Wednesday, November 17, 2021

Hearing Room 1568

10:00 AM

2:21-13817 DTLA Hookah, LLC

Chapter 11

#8.00 Show Cause Hearing RE: [30] Application for Issuance of Order to Show Cause why Joel S. Farkas Should Not be Held in Contempt of the Court and Directing Joel S. Farkas to Appear to Explain Why He Failed to Comply with the Court's Order (Attachments: # 1 COS) (Yip, Hatty)

Docket 30

Tentative Ruling:

11/16/2021

Note: Parties must appear by telephone. The courtroom is undergoing renovation. To make a telephonic appearance, parties should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Court will sanction Joel S. Farkas by requiring him to disgorge the entire amount of compensation he received for representing the Debtor in this case.

Pleadings Filed and Reviewed:

- 1) Order Requiring Joel S. Farkas to Appear and Show Cause Why He Should Not Be Held in Civil Contempt for Knowingly Violating the Court's Order Requiring Farkas to File a Disclosure of Compensation Form Stating the Amount That He Received for Representing the Debtor [Doc. No. 33] (the "OSC")
 - a) Bankruptcy Noticing Center Certificate of Notice [Doc. No. 36]
 - b) Certificate of Service filed by the United States Trustee [Doc. No. 38]
- 2) Order Granting United States Trustee's Motion to Order the Filing of Disclosure of Compensation Pursuant to 11 U.S.C. § 329
- 3) As of the date of issuance of this tentative ruling, no response to the OSC is on file

I. Facts and Summary of Pleadings

On May 10, 2021 (the "Petition Date"), DTLA Hookah (the "Debtor") filed a voluntary Chapter 11 petition. The Debtor was represented by Joel S. Farkas ("Farkas"). On June 15, 2021, upon the motion of Haven Ontario Properties, LLC ("Haven"), the Court lifted the automatic stay to permit Haven to enforce an unlawful

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CONT... DTLA Hookah, LLC

Chapter 11

detainer judgment that it had obtained against the Debtor prior to the Petition Date. Doc. No. 18 (the "RFS Order"). The Debtor did not file a written opposition to Haven's motion for relief from the automatic stay (the "RFS Motion"). Farkas appeared at the hearing on the RFS Motion and asserted that service of the RFS Motion had been inadequate.

On June 25, 2021, the case was dismissed as the result of the Debtor's failure to file schedules. Doc. No. 22 (the "Dismissal Order"). The Dismissal Order was entered ten day days subsequent to entry of the RFS Order.

On August 4, 2021, upon the motion of the United States Trustee (the "UST"), the Court ordered Farkas to file the Disclosure of Compensation form required by § 329 by no later than August 18, 2021. After Farkas failed to timely file the Disclosure of Compensation form, the Court issued an *Order Requiring Joel S. Farkas to Appear and Show Cause Why He Should Not Be Held in Civil Contempt for Knowingly Violating the Court's Order Requiring Farkas to File a Disclosure of Compensation Form Stating the Amount That He Received for Representing the Debtor* [Doc. No. 33] (the "OSC"). Farkas has not responded to the OSC.

II. Findings of Fact and Conclusions of Law

Section 329(a) requires any attorney representing a debtor who seeks bankruptcy protection to "file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." Section 329(b) authorizes the Court to "order the return of any such payment" upon a finding that "such compensation exceeds the reasonable value of any such services."

Pursuant to 28 U.S.C. § 586, the UST is charged with "supervis[ing] the administration of cases under ... title 11." The UST's supervisory responsibilities include reviewing the amounts paid by debtors for bankruptcy representation and, where appropriate, moving for the disgorgement of compensation exceeding the reasonable value of the services provided.

Because he chose to represent the Debtor in connection with this case, Farkas was obligated to file the Disclosure of Compensation in accordance with the requirements of § 329. Farkas' obligation to file the Disclosure of Compensation form was reinforced on August 4, 2021, when the Court entered an order compelling Farkas to file the form.

Farkas' failure to file the Disclosure of Compensation form has prevented the UST

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CONT... DTLA Hookah, LLC

Chapter 11

from discharging his statutory obligation to insure that the amount that the Debtor paid for bankruptcy representation in this case was reasonable. Farkas has been provided multiple opportunities to fulfill his obligations under § 329. Farkas should have filed the Disclosure of Compensation form without any intervention from the Court. Farkas was given a second opportunity to cure his failure to file the form after the Court ordered Farkas to file the form on August 4, 2021. Upon issuance of the OSC, Farkas was provided a third opportunity to file the form.

The Bankruptcy Court has authority to impose compensatory civil contempt sanctions pursuant to § 105. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002). "The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003). "The burden then shifts to the contemnors to demonstrate why they were unable to comply." *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). Inability to comply is a defense, but the burden is upon the alleged contemnor to show "categorically and in detail" how compliance is "impossible." *Id.* at 1241.

Because Farkas has been provided multiple opportunities to comply with § 329, and because Farkas' failure to comply has prevented the UST from discharging his statutory obligation to supervise the administration of this case, the Court will sanction Farkas by requiring him to disgorge the entire amount of compensation he received for representing the Debtor in this case. The Court notes that in addition to being supported by the Court's civil contempt power, this sanction is warranted under § 329. This case was dismissed based on Farkas' failure to timely file the Debtor's schedules. In view of Farkas' failure to perform the rudimentary service of filing the Debtor's schedules, the Court is comfortable finding that whatever amount of compensation Farkas received was not reasonable in relation to the services that he provided.

According to the limited schedules that Farkas did file, the Debtor had estimated assets of between \$100,001 and \$500,000 and estimated liabilities of between \$0 and \$50,000. In the Court's experience, a retainer of \$10,000 is typical for a Chapter 11 case of this size. By no later than **December 8, 2021**, Farkas (1) shall disgorge \$10,000 to the Debtor (or to the person that paid Farkas' retainer), or provide proof of the actual amount charged and disgorge that amount, and (2) shall file a declaration under penalty of perjury attesting that the funds have been disgorged and providing proof of the disgorgement.

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CONT... DTLA Hookah, LLC

Chapter 11

If Farkas fails to meet the December 8, 2021 deadline, the Court will impose an additional sanction of \$50 for each day that Farkas remains out of compliance, payable to the Court. This \$50 daily fine qualifies as a civil contempt sanction because Farkas has the ability to avoid paying the fine by disgorging the fees he received for representing the Debtor. *See In re Count Liberty, LLC*, 370 B.R. 259, 274–75 (Bankr. C.D. Cal. 2007) ("Where the fine is not compensatory, it is civil only if the contemnor is able to avoid paying the amount imposed by performing the act required by the court's order."). Farkas' failure to meet the December 8 deadline will also result in the referral of this matter to the State Bar of California for further action.

III. Conclusion

Based upon the foregoing, the Court will sanction Farkas by requiring him to disgorge the entire amount of compensation he received for representing the Debtor in this case. The Court will prepare and enter an appropriate order.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

DTLA Hookah, LLC

Represented By
Joel S Farkas

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Wednesday, November 17, 2021

Hearing Room 1568

11:00 AM

2:21-13523 Urban Commons LLC

Chapter 7

Adv#: 2:21-01209 Berritto Enterprises LLC v. Urban Commons LLC et al

#100.00 Hearing
RE: [15] Motion to Dismiss Adversary Proceeding and Notice Thereof

Docket 15

***** VACATED *** REASON: PER ORDER ENTERED 11-16-21**

Tentative Ruling:

11/16/2021

Order entered. The Motion to Dismiss is **DENIED AS MOOT** in view of the filing of the First Amended Complaint.

Party Information

Debtor(s):

Urban Commons LLC

Represented By
Eric Bensamochan

Defendant(s):

Urban Commons LLC

Represented By
Eric Bensamochan

Taylor Woods

Pro Se

Howard Wu

Pro Se

Sky Holdings LLC

Pro Se

Plaintiff(s):

Berritto Enterprises LLC

Represented By
Peter C Bronstein

Trustee(s):

Carolyn A Dye (TR)

Represented By
Leonard Pena

**United States Bankruptcy Court
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Hearing Room 1568

11:00 AM

2:20-11634 XLmedica, Inc.

Chapter 11

#101.00 HearingRE: [113] Application to Employ Patricia Flanagan & Fox Rothchild LLP as Special Counsel Notice of Motion and Motion in Chapter 11 Case for Order Authorizing Debtor in Possession to Employ Patricia Flanagan & Fox Rothchild LLP as Special Counsel, with Proof of Service

Docket 113

Tentative Ruling:

11/16/2021 at 5:15 p.m.

Note: Parties must appear by telephone. The courtroom is undergoing renovation. To make a telephonic appearance, parties should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the opposition of EmCyte is **OVERRULED** and the Employment Application is **GRANTED**.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Motion in Chapter 11 Case for Order Authorizing Debtor in Possession to Employ Professional (Other Than General Bankruptcy Counsel) [Doc. No. 113] (the "Employment Application")
 - a) Notice of Hearing on Application of Debtor and Debtor-in-Possession for Authority to Employ Patricia Flanagan and Fox Rothschild as Special Counsel for the Estate [Doc. No. 135]
- 2) EmCyte Corp.'s Response in Opposition to XLmedica, Inc.'s Motion for Order Authorizing Debtor in Possession to Employ Professional (Other Than General Bankruptcy Counsel) [Doc. No. 133]
 - a) Request for Hearing on EmCyte Corp.'s Response in Opposition to XLmedica, Inc.'s Motion for Order Authorizing Debtor in Possession to Employ Professional (Other Than General Bankruptcy Counsel) [Doc. No. 134]
- 3) Debtor's Reply to Opposition to Motion to Employ Special Counsel [Doc. No. 137]
- 4) Supplement to Debtor's Motion in Chapter 11 Case for Order Authorizing Debtor in Possession to Employ Professional—Patricia M. Flanagan and Fox Rothschild

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CONT... **XLmedica, Inc.**
as Special Counsel [Doc. No. 139]

Chapter 11

I. Facts and Summary of Pleadings

A. Background

On February 13, 2020 (the "Petition Date"), XLmedica, Inc. (the "Debtor") filed a voluntary Chapter 11 petition. Doc. No. 1 (the "Petition"). On June 2, 2020, upon the motion of EmCyte Corporation ("EmCyte"), the Court lifted the automatic stay to enable EmCyte to proceed with two non-bankruptcy actions against the Debtor. Doc. No. 30 (the "RFS Order"). In one of the actions, pending in the United States District Court for the Middle District of Florida, EmCyte alleges that the Debtor infringed upon EmCyte's intellectual property (the "Infringement Action"). In the other action, pending in a Florida State Court, EmCyte asserts claims for fraudulent inducement, breach of contract, usurpation of corporate opportunities, and misappropriation of trade secrets (the "State Court Action," and together with the Infringement Action, the "Non-Bankruptcy Actions").

On August 18, 2020, the Court authorized the Debtor to employ Callagay Law, P.C. ("Callagay") to defend against the Non-Bankruptcy Actions. Doc. No. 38. To date, the Court has awarded Callagay \$123,683.00 in fees and \$419.36 in costs for defending the Debtor against the Non-Bankruptcy Actions. Doc. Nos. 82 and 115.

In the Petition, the Debtor did not check the box indicating that it was a "small business debtor" for purposes of § 101(51D). Petition at § 8. The Small Business Reorganization Act of 2019 (the "SBRA") took effect on February 19, 2020, six days after the Petition Date. On October 21, 2021—approximately eighteen months subsequent to the Petition Date—the Debtor filed an amended voluntary petition [Doc. No. 119] (the "Amended Petition"), which made two changes to the Petition. First, the Debtor stated that it is a "small business debtor" as defined in § 101(51D). Amended Petition at ¶ 8. Second, the Debtor elected treatment under Subchapter V of Chapter 11. *Id.* Concurrently with the filing of the Amended Petition, the Debtor filed a *Plan of Reorganization* [Doc. No. 110] (the "Plan"). On October 21, 2021, the United States Trustee (the "UST") appointed Gregory K. Jones as the Subchapter V Trustee.

On September 30, 2021, EmCyte filed a motion to dismiss the case [Doc. No. 97] (the "Motion to Dismiss") pursuant to § 1112(b), arguing that the Debtor has failed to make sufficient progress toward reorganization and that to date, the case has primarily benefitted insiders. EmCyte further asserted that the Debtor's attempt to elect treatment under Subchapter V was untimely and in bad faith. On October 7, 2021, the

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Debtor filed an objection to EmCyte's Proof of Claim. Doc. No. 103 (the "Claim Objection").

On November 1, 2021, the Court entered an order setting a hearing on whether the Debtor would be permitted to retroactively elect treatment under Subchapter V for January 5, 2022. Doc. No. 129 (the "Subchapter V Procedures Order"). [Note 1] Based upon a finding that "[t]his case cannot proceed further until it has been determined whether the Debtor's re-designation to Subchapter V was appropriate," the Court continued the hearings on the Claim Objection and the Motion to Dismiss to January 5, 2022. Subchapter V Procedures Order at ¶ 3.

B. Summary of Papers Filed in Connection with the Employment Application

The Debtor moves for authorization to employ Fox Rothschild, LLP ("Fox Rothschild") as its special litigation counsel. The Debtor brings the Employment Application so that Fox Rothschild can replace Callagay as the firm defending the Debtor against the Non-Bankruptcy Actions. Fox Rothschild's \$15,000 retainer will be funded by a gift from Angel Oliferuk ("Oliferuk"). Oliferuk is the sister of Anna Stahl ("Stahl"). Stahl is the Debtor's CEO and sole shareholder.

EmCyte opposes the Employment Application, and makes the following arguments in support of its opposition:

- 1) Fox Rothschild "might end up with conflicting loyalties" in its representation of the Debtor because its retainer is being paid by Oliferuk. Opposition at 3. Although Oliferuk asserts that the retainer is a "gift," that is not correct because the Debtor's Monthly Operating Reports indicate that it is making monthly payments A2M Bio, Inc. ("A2M"), a company that solely owned by Oliferuk. Therefore, "Oliferuk is a creditor of the Estate. In her individual capacity, or through A2M Bio, she is owed money by the Estate. No other source of income is identified as existing for Angel Oliferuk, so the funds paid, or to be paid, to Fox Rothschild presumably were paid by the Estate to Angel Oliferuk. So funds of the Estate, which it cannot afford, are being used to fund the retainer." *Id.* at 4. [Note 2]
- 2) It would be irresponsible for the Court to authorize the employment of an additional professional because the estate is administratively insolvent. *Id.* at 2.

The Debtor makes the following arguments in its Reply to EmCyte's Opposition:

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CONT... XLmedica, Inc.

Chapter 11

- 1) EmCyte's opposition to the Employment Application is nothing more than an attempt to prevent the Debtor from defending itself in the Non-Bankruptcy Actions, which EmCyte initiated.
- 2) The estate is not administratively insolvent. On October 19, 2021, the Debtor filed a Plan, which contains financial projections demonstrating that the Plan is feasible and that the Debtor has the ability to pay administrative claims.
- 3) Oliferuk is not an administrative creditor of the estate. The estate pays A2M Bio Inc. ("A2M") for providing management and operations services, including bookkeeping, ordering, and logistics. Although A2M is wholly owned by Oliferuk, it is A2M, not Oliferuk, that is an administrative creditor. Further, the Debtor is not A2M's only client; A2M has other business and sales operations.

II. Findings of Fact and Conclusions of Law

Section 327(a) provides that "the trustee, with the court's approval, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." Section 101(14) defines "disinterested person" as "a person that is not a creditor, an equity security holder, or an insider; is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." Section 327(c) provides that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

Within the context of §327(a), a professional holds an "interest adverse to the estate" if that professional "possess[es] or assert[s] any economic interest that would tend to lessen the value of the bankrupt estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) ... possess[es] a predisposition under circumstances that render such a bias against the estate." *Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis)*, 347 B.R. 679, 688 (9th Cir. B.A.P. 2006).

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There is no merit to EmCyte's contention that Fox Rothschild holds an adverse interest to the estate because its \$15,000 retainer will be paid by Oliferuk. EmCyte's focus upon whether Oliferuk is or is not an administrative creditor of the estate is misdirected. For purposes of § 327(a)'s "disinterested" requirement, what matters is whether Fox Rothschild is a creditor of the estate. Whether Oliferuk is or is not a creditor of the estate is simply not relevant because the Debtor is seeking to employ Fox Rothschild, not Oliferuk.

Patricia M. Flanagan, the attorney at Fox Rothschild responsible for the engagement, has submitted a sworn declaration attesting that Fox Rothschild is not a creditor, equity security holder, or insider of the Debtor. Flanagan Decl. [Doc. No. 113] at ¶ 2. There is no evidence in the record indicating that Fox Rothschild is a creditor or holds an adverse interest to the estate.

EmCyte next argues that Fox Rothschild should not be employed as special litigation counsel because the estate is administratively insolvent. EmCyte's allegations of administrative insolvency also miss the mark. Professionals accepting employment under § 327 understand that any compensation they receive is ultimately subject to approval by the Court. Such professionals also accept the risk that they may not be paid in full in the event the estate is administratively insolvent. EmCyte has submitted no evidence to substantiate its allegation that the estate is administratively insolvent, but even if it had, that would not be grounds for denying the Employment Application.

EmCyte has failed to demonstrate that Fox Rothschild's employment would not be in the best interests of the estate. Its opposition to the Employment Application appears to be a tactical attempt to derail the Debtor's defense of the Non-Bankruptcy Actions by depriving it of competent counsel.

On November 16, 2021, the Debtor filed a supplement to the Employment Application [Doc. No. 139] (the "Supplement"), which disclosed that on November 10, 2021, A2M retained Fox Rothschild to represent A2M in responding to a subpoena served upon A2M by EmCyte in the Infringement Action. A2M has not been named as a defendant in the Infringement Action. The subpoena seeks to obtain from A2M information pertaining to the Debtor's finances. (A2M provides bookkeeping services for the Debtor.) The Debtor represents that the financial documents sought from A2M by the subpoena are in the Debtor's possession, not A2M's possession.

The information disclosed in the Supplement does not alter the Court's conclusion that Fox Rothschild is disinterested and holds no adverse interest to the estate. The

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interests of the Debtor and A2M are not adverse with respect to the subpoena. Therefore, Fox Rothschild's representation of A2M in connection with the subpoena does not disqualify it from defending the Debtor in the Infringement Action.

III. Conclusion

Based upon the foregoing, the opposition of EmCyte is **OVERRULED** and the Employment Application is **GRANTED**. Within seven days of the hearing, the Debtor shall submit a proposed order incorporating this tentative ruling by reference.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

As explained in the Subchapter V Procedures Order, under Bankruptcy Rule 1020(b), interested parties have thirty days from the conclusion of the § 341(a) meeting of creditors to object to a debtor's statement that it is a "small business debtor" as defined by § 101(51D). A debtor cannot elect treatment under Subchapter V unless it is also a "small business debtor." The § 341(a) meeting of creditors was scheduled for November 4, 2021, making December 6, 2021 the deadline to object to the Debtor's small-business designation (assuming that the meeting of creditors concluded on November 4, 2021). In view of the possibility that objections to the Debtor's re-designation to Subchapter V could be predicated upon objections to the Debtor's small-business designation, it was necessary for the Court to delay the re-designation hearing to provide parties a sufficient opportunity to object to the Debtor's small-business designation.

Note 2

Page citations are to the CM/ECF pagination appearing at the top of each page, not the pagination used by the document's preparer.

Party Information

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Debtor(s):

XLmedica, Inc.

Represented By
Matthew D. Resnik
Roksana D. Moradi-Brovia

Trustee(s):

Gregory Kent Jones (TR)

Pro Se